

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEARVISE COLLIER,

Defendant-Appellant.

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UNPUBLISHED

July 23, 2013

No. 309382

Wayne Circuit Court

LC No. 10-013048 FH

Before: STEPHENS, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of less than 25 grams of methamphetamine, MCL 333.7403(2)(a)(v), and possession of marijuana, MCL 333.7403(2)(d). The court sentenced defendant, as a third habitual offender, MCL 769.11, to 25 months to 8 years of imprisonment for the possession of methamphetamine conviction and to one to two years' imprisonment for the possession of marijuana conviction. We affirm.

This case arises from a search and subsequent arrest that occurred on October 22, 2010, in Detroit, Michigan. While on patrol that evening, Detroit police officers William Rice and Charles Ruffin observed three to six people, including defendant, apparently drinking alcohol in a parking lot on Gratiot Avenue. Officer Ruffin conducted a search of defendant's person and found 24 knotted bags containing 24 Ecstasy pills and 8 Zip-Lock bags containing marijuana. Curtis Mickens was also present and began walking away when the officers approached. He dropped a pill bottle that contained a substance later identified as cocaine. Both defendant and Mickens were arrested.<sup>1</sup>

Defendant was originally charged with possession with intent to deliver methamphetamine, MCL 333.7401(2)(b)(i), and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). During trial, the prosecution called only officers Rice and Ruffin as witnesses. After the prosecution rested, defendant moved for directed verdicts of acquittal with

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<sup>1</sup> Mickens was tried along with defendant and was convicted of possession of a mixture containing less than 25 grams of cocaine, MCL 333.7403(2)(a)(v). He, however, is not part of this appeal.

respect to the possession with intent to deliver charges. Concluding that the prosecution had presented no evidence concerning intent to deliver any of the substances, the court granted the motion. As a result, the charges of possession of less than 25 grams of methamphetamine, MCL 333.7403(2)(a)(v), and possession of marijuana, MCL 333.7403(2)(d), were instead submitted to the jury.

Defendant first argues that he was denied a fair trial by the prosecution's failure to list, as *res gestae* witnesses, individuals who were present when defendant was searched and then arrested. He also argues that his trial counsel's failure to request a missing witness jury instruction amounted to ineffective assistance of counsel. We disagree.

A defendant must object at trial in order to preserve the argument that he was denied a fair trial. *People v Conley*, 270 Mich App 301, 305; 715 NW2d 377 (2006). Defendant did not raise an objection that the trial was unfair because the prosecution failed to list the civilian *res gestae* witnesses. Therefore, this issue is unpreserved, and we review it for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Under MCL 767.40a, the prosecution's burden is "to give initial and continuing notice of all known *res gestae* witnesses, identify witnesses the prosecutor intends to produce, and provide law enforcement assistance to investigate and produce witnesses the defense requests." *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001). "[T]he purpose of the 'listing' requirement is merely to notify the defendant of the witness' existence and *res gestae* status." *People v Gadomski*, 232 Mich App 24, 36; 592 NW2d 75 (1998), quoting *People v Calhoun*, 178 Mich App 517, 523; 444 NW2d 232 (1989). "Therefore, if the defendant knew of the *res gestae* witness in any event, the prosecutor's failure to list the witness would be harmless error." *Calhoun*, 178 Mich App at 523.

Defendant does not dispute the police officers' testimony that he was standing in a parking lot with several other individuals when the police officers approached. He does not claim that he lacked notice that these witnesses existed and presumably observed the interaction between defendant and the police officers. At minimum, the police officers' testimony during the preliminary examination several months before the trial put defendant on notice of the existence of these witnesses. Both officers testified, as they did at trial, about the presence of a total of three to six people in the parking lot. It was not the prosecution's burden to produce these witnesses, *People v Cook*, 266 Mich App 290, 294-295; 702 NW2d 613 (2005), and there is no allegation that the defense requested and was denied the prosecution's assistance in identifying and locating these witnesses. Thus, assuming *arguendo* that it was erroneous to not list these "witnesses," there simply is no indication that the prosecution's failure to list the witnesses affected the fairness of the trial. Accordingly, defendant cannot establish any plain error that affected a substantial right.

Further, trial counsel's failure to request the missing witness instruction, CJI2d 5.12,<sup>2</sup> did not amount to ineffective assistance of counsel. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews a trial court's findings of fact for clear error, and questions of constitutional law de novo. *Id.* It reviews unpreserved ineffective assistance of counsel claims for errors apparent on the record. *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011).

"Effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise." *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). "In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id.* "Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id.* Because it was not the prosecution's responsibility to produce these witnesses at trial, the missing witness instruction was not warranted in this case. *Cook*, 266 Mich App at 294-295. Trial counsel did not render ineffective assistance by failing to request a jury instruction that would have been inappropriate under the circumstances.

Next, defendant argues that there was insufficient evidence for the jury to convict him of possession of methamphetamine and possession of marijuana. We disagree.

We review a challenge to the sufficiency of the evidence de novo. *People v Cox*, 268 Mich App 440, 443; 709 NW2d 152 (2005). "In reviewing a challenge to the sufficiency of the evidence, this Court analyzes the evidence presented in the light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt." *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002).

Defendant claims that the evidence was insufficient because the additional res gestae witnesses did not testify, no fingerprint tests were performed, and the police car did not have video capability. None of these things was required for the prosecution to establish that defendant possessed the drugs. The prosecution presented evidence that when defendant was searched, police found 24 knotted bags containing 24 Ecstasy pills and 8 Zip-Lock bags containing marijuana on his person. The substances were introduced into evidence at trial. This was sufficient for a jury to conclude beyond a reasonable doubt that defendant possessed the contraband.

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<sup>2</sup> CJI2d 5.12 provides: "\_\_\_ is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case."

Defendant also relies on inconsistencies in the police testimony, relating to the time of the incident and the location of where the controlled substances were found on defendant's person, to show that the evidence was insufficient. For example, one police officer testified at trial that, as reflected in his report, the time of the incident was approximately 8:00 p.m. The time in the CRISNET report, a report completed later at the police precinct, listed the time as 9:04 p.m. The same officer was also asked about his testimony during the preliminary examination that the events took place at approximately 10:10 p.m. He did not recall this testimony but agreed that he had given the time as 10:10 p.m. once he was shown the transcript. He then testified that his preliminary examination testimony was incorrect and that approximately 8:00 p.m. was the correct time. A second police officer also testified that the incident occurred shortly after 8:00 p.m.

Concerning the location of the controlled substances, the second police officer testified at trial that he found the controlled substances in defendant's left pocket and money in defendant's right pocket. After defense counsel showed him the preliminary examination transcript, which recorded the officer as testifying that the controlled substances were in the right pocket, the officer said, "I misquoted myself." However, as our Court has noted previously, such "inconsistencies do not create a lack of sufficiency of evidence[] because they were issues for the jury to resolve in determining the credibility of the witness' testimony." *People v Smith*, 205 Mich App 69, 72 n 1; 517 NW2d 255 (1994); see also *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Regardless of any inconsistencies, the officer testified that there was no doubt in his mind that the items in question were recovered from defendant. In short, if they were recovered from defendant's left pocket or his right pocket, or at 8:00 p.m. or at 10:00 p.m., it has no bearing on the crime of possession itself. Thus, a reasonable jury could have found the police testimony, that defendant possessed the contraband, credible despite these minor inconsistencies.

Affirmed.

/s/ Cynthia Diane Stephens  
/s/ Kurtis T. Wilder  
/s/ Donald S. Owens